

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Special Access Rates for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10539

**REPLY COMMENTS OF HAWAIIAN TELCOM, INC. AND HAWAIIAN  
TELCOM SERVICES COMPANY, INC.**

Hawaiian Telcom, Inc. (“HTI”) and Hawaiian Telcom Services Co., Inc.

(“HTSC”) (collectively, “Hawaiian Telcom”) hereby submit these reply comments in the above-captioned proceedings. The Public Notice seeks comments on the analytical framework the Federal Communications Commission should use to analyze the special access rates of price cap incumbent local exchange carriers (“price cap ILECs”).<sup>1</sup> The current rules the FCC has established to govern special access services, and the framework it has adopted applicable to other types of broadband services, are working as contemplated and provide public interest benefits to consumers. Although competitors and end users understandably are seeking lower prices, there are sufficient alternatives available in the market that produce reasonable prices. In particular, there is no evidence that special access rates of price cap carriers are unreasonable, particularly with respect to special access rates of mid-size carriers, such as Hawaiian Telcom. Hawaiian Telcom

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1 Public Notice, *Parties Asked To Comment on Analytical Framework Necessary To Resolve Issues in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, 74 Fed. Reg. 63702 (Dec. 4, 2009)(“Public Notice”).

therefore urges the Commission to terminate this inquiry and permit existing rules to govern.

## **I. INTRODUCTION.**

Hawaiian Telcom is the incumbent local exchange carrier in the State of Hawaii with 470,024 local access lines as of December 31, 2009. It provides 96,028 high-speed internet lines, which served 79,256 retail residential lines, 15,530 retail business lines and 1,242 wholesale business and resale lines. It also provides long distance and high-capacity business services. Hawaiian Telcom faces stable and growing competitors in the state. time warner telecom of hawaii and Wavecom Solutions, for instance, both provide voice, private line (i.e., special access services), and broadband communications services to residential and/or business subscribers.

The FCC adopted price cap regulation in 1991 when incumbent LECs still had few competitors.<sup>2</sup> Price cap regulation replaced the more traditional method of rate regulation, rate-of-return, and was designed to provide incentives that would encourage incumbent LECs to become more efficient, while ensuring that rates remained within a zone of reasonableness.<sup>3</sup> The pricing flexibility that the price cap system afforded carriers, was designed to resemble more closely the way prices behave in competitive markets. It was established as a transitional mechanism until market forces obviated the need for rate regulation.<sup>4</sup>

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<sup>2</sup> See *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786 (1990) (“LEC Price Cap Order”).

<sup>3</sup> *Id.*, at ¶¶ 2-4.

<sup>4</sup> *Price Cap Performance Review for Local Exchange Carriers*, First Report and Order, 10 FCC Rcd 8961, 9055 (1995) (“1995 Price Cap Review Order”).

As marketplace and competitive forces grew, price cap regulations were substantially changed as the FCC gained more experience with the regulations. Each of these modifications incrementally led to a more deregulated framework, increasing the amount of flexibility provided. The FCC has repeatedly acknowledged that competition for special access services has grown faster than that for switched services.

Beginning in 1992, the FCC allowed special access and switched transport services to be deaveraged within geographic regions to reflect the cost of providing service more closely.<sup>5</sup> The Commission increased pricing flexibility in 1999, recognizing that competition in the marketplace had been growing.<sup>6</sup> In the *Pricing Flexibility Order*, the Commission eliminated most of the constraints on geographic deaveraging for trunking basket services, including special access services.

The *CALLS Order* further deregulated the price cap mechanism.<sup>7</sup> The special access basket was modified by separating them from the trunking basket services in order to prevent incumbent LECs from potentially reducing the price of special access services, the price cap services most subject to competition, while raising the price of trunking services, which were subject to a lesser extent of competition.<sup>8</sup> The FCC established a new X-factor to the special access services basket—3.0 percent in 2000, 6.5 percent in each of the next three years. The X factor was set equal to inflation beginning July 1,

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<sup>5</sup> See, e.g., *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992).

<sup>6</sup> *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (“*Pricing Flexibility Order*”).

<sup>7</sup> *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962 (2000) (“*CALLS Order*”).

<sup>8</sup> *Id.*, at ¶ 172.

2004, in the special access basket to ensure that rates remained in a zone of reasonableness.<sup>9</sup>

All of the deregulatory steps taken with respect to special access services have been a measured response to marketplace facts. The FCC adopted measured but increasing steps in the amount of pricing flexibility provided to incumbent LECs, particularly for special access services, based on these marketplace facts. Although certain parties have sought for a number of years to turn back this clock based on incomplete evidence and distorted facts, the FCC has so far rightly refused to alter price cap regulation of special access services.<sup>10</sup>

**II. THERE IS NO RECORD JUSTIFICATION FOR MODIFYING THE RULES FOR SPECIAL ACCESS RATES, ESPECIALLY FOR MID -SIZE CARRIERS LIKE HAWAIIAN TELCOM.**

Since the aforementioned, measured deregulatory steps were taken by both Democratic and Republican controlled Commissions over the period of two decades, there has continued to be a significant debate about whether special access services are provided at a reasonable price. Although CLECs and end users have demanded lower prices, a natural desire by customers and those carriers which seek to avoid the risks of building facilities on their own, this debate has produced very little in the way of evidence which could justify a regulatory change.

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<sup>9</sup> *Id.*, at ¶ 149.

<sup>10</sup> *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593 (filed Oct. 15, 2002) (“*AT&T Petition for Rulemaking*”). AT&T has also retracted the position it took eight years ago. *See, e.g.*, Comments of AT&T, WC Docket No. 05-25, at 21 (filed Jan. 19, 2010).

These attempts at reregulation are flatly inconsistent with previous findings of the Commission that regulations risk undermining investment incentives, which are crucial to establishing a competitive marketplace. For instance, the Commission has

expressed a preference for facilities-based competition. This preference has been validated by the D.C. Circuit as the correct reading of the statute. Since its inception, UNE-P was designed as a tool to enable a transition to facilities-based competition. It is now clear, as discussed below, that, in many areas, UNE-P has been a disincentive to competitive LECs' infrastructure investment. Accordingly, consistent with the D.C. Circuit's directive, we bar unbundling to the extent there is any impairment where—as here—unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition.<sup>11</sup>

Alteration of existing special access rates will undermine investment incentives, and therefore distort the very competition that the Commission wants to foster and which CLECs are purportedly seeking in this proceeding.

None of the commenters on the Public Notice, or during prior rounds of comments, provided any facts which could justify a regulator to even begin an investigation of special access rates of price cap carriers, particularly the special access rates of mid-size carriers like Hawaiian Telcom. Furthermore, although CLECs and end users employ various terms to describe the class of carriers that their proposed new regulations should apply to, such as “LECs”, “price cap LECs”, “BOCs”, none of the evidence that is presented to justify this re-regulation involves mid-size ILECs.<sup>12</sup>

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<sup>11</sup> *Unbundled Access to Network Elements*, WC Docket No. 04-313, 20 FCC Rcd 2533, ¶ 218 (2005)(footnotes omitted).

<sup>12</sup> Only one group of CLECs even mentions mid-size carriers. This group only indicates in a footnote that one mid-sized ILEC raised its tariffed special access rates in one jurisdiction after it had been afforded pricing flexibility. Comments of PAETEC, *et al.*, WC Docket No. 05-25, at 4 n.13 (filed Jan. 19, 2010). However, this group made

Some commenters attempt to argue that there is market failure, or the market has not developed as the FCC expected, or that prices are not reasonable.<sup>13</sup> The parties allege that BOC earnings are excessive, and therefore the market cannot possibly be working.<sup>14</sup> They also allege that rates are unreasonable because they are higher than those charged for other services, such as DSL or Ethernet, which they seem to imply are physically the same services as special access services.<sup>15</sup> Notwithstanding these facially appealing allegations, none of these arguments provide a basis for re-regulating the special access services market of mid-size carriers.

Hawaiian Telcom's generally available special access rates, such as non-term DS-1 and DS-3 rates, have not increased since 2000.<sup>16</sup> Comparing other services to special access services demonstrates either that they are not valid substitutes, or are available to customers in order to reduce costs. Either way, there is no analytical framework or

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no attempt to demonstrate the rates identified were not supported by costs or were otherwise justified in the marketplace. And even this one reference fails to indicate whether actual rates charged to customers are equal to the generally available tariffed rates cited in the pleading.

<sup>13</sup> See e.g., Comments of NoChokePoints Coalition, WC Docket No. 05-25, at 16 (filed Jan. 19, 2010); Comments of COMPTTEL, WC Docket No. 05-25, at 1 (filed Jan. 19, 2010).

<sup>14</sup> See, e.g., Comments of XO Communications, LLC, WC Docket No. 05-25, at 4 (filed Jan. 19, 2010); Comments of Ad Hoc Telecommunications Users Coalition, WC Docket No. 05-25, at 2 (filed Jan. 19, 2010).

<sup>15</sup> See, e.g., Comments of Sprint Nextel Corp. WC Docket No. 05-25, at 25-28 (filed Jan. 19, 2010).

<sup>16</sup> Sprint Nextel argues, without support, that because special access rates have nominally stayed constant over the years, that this has been an effective increase since volume has increased. Sprint Nextel Comments at 37. This argument ignores that providing additional circuits is bound to increase carrier costs at the same time. Sprint is basically arguing that there should be a revenue freeze for special access services, even if volume increases, a result which is neither mandated by the rules nor reasonable from an economic perspective.

evidence which would justify beginning a proceeding on special access rates. In particular, even the National Regulatory Research Institute (“NRRI”), which was commissioned by the National Association of Regulatory Utility Commissioners to study special access pricing, does not recommend repricing mid-size price cap carrier access rates, although it included data from non-RBOC companies in its study.<sup>17</sup>

### **III. PRICING FLEXIBILITY BENEFITS CUSTOMERS BY PERMITTING ADDED FLEXIBILITY TO CARRIER OFFERINGS.**

Hawaiian Telcom has been afforded Phase I pricing flexibility in the non-MSA areas of Hawaii and Phase II pricing flexibility in the Honolulu, Hawaii MSA for its dedicated transport and special access services, other than channel terminations between its end offices and end user customer premises, because it faces substantial competition in this market.<sup>18</sup> time warner telecom,<sup>19</sup> and Wavecom<sup>20</sup> provide special access services in

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<sup>17</sup> P. Bluhm & R. Laube, *Competitive Issues in Special Access Markets*, 95 (National Regulatory Research Institute; Jan. 21, 2009). Even the now widely discredited General Accountability Office Study on special access pricing did not recommend any action against mid-size carrier special access pricing. *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Service*, GAO-07-80 (General Accountability Office, Nov. 2006)(“GAO Report”).

<sup>18</sup> *Petition of Hawaiian Telcom, Inc. for Phase I Pricing Flexibility Pursuant to Section 69.709 of the Commission’s Rules*, WCB/Pricing File No. 08-01, 23 FCC Rcd 7856 (Wir. Comp. Bur., 2008); *Petition of Verizon for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 01-27, 17 FCC Rcd 5359 (Wir. Comp. Bur., 2002), and WCB/Pricing File No. 03-10, 18 FCC Rcd 11356 (Wir. Comp. Bur., 2003).

<sup>19</sup> time warner is authorized to provide special access services, *see* Docket No. 94-0093, Decision & Order No. 14145 (Haw. Public Util. Comm., rel. Aug. 17, 1995), and dedicated transport services, *see* Docket No. 95-0329, Decision & Order No. 14842, (Haw. Pub. Util. Comm., rel. Aug. 5, 1996).

<sup>20</sup> Wavecom is the trade name for Pacific Lightnet, Inc., which is also authorized to provide special access services. *See Application of Pacific Lightnet, Inc., for a Certificate of Authority and for Approval of Ownership of More than Twenty-Five Percent of Voting Stock of Pacific Lightnet, Inc.*, Docket No. 01-0157, Decision & Order No. 18868 (Haw. Pub. Util. Comm., rel. Aug. 31, 2001).

the Hawaii market. Hawaiian Telcom customers enjoy substantial benefits from the flexibility it has been afforded. Hawaiian Telcom is able to offer customers contract tariffs on one day's notice, and volume and term offerings that permit customers to obtain discounted pricing. Eliminating pricing flexibility is likely to damage customers who would face increases because the rates found in Hawaiian Telecom's generally available tariffed rates may be higher. Requiring tariffing of all special access rates in a generally available tariff is likely to undermine competition by permitting competitors to know what Hawaiian Telcom would bid in any particular situation and prevent Hawaiian Telcom from meeting the lower prices of competitors.<sup>21</sup>

In addition, customers have enjoyed the benefit of forbearance from regulation for so-called high-capacity broadband services. PAETEC argues that the FCC should re-regulate ILEC provision of high-capacity broadband services in order to preserve competition.<sup>22</sup> Notwithstanding, PAETEC has cited nothing to justify elimination of such deregulatory actions, particularly with respect to mid-size carriers.

Regardless, modifying or eliminating previously provided forbearance relief is beyond the scope of the issues raised in this Public Notice. The Notice only raises questions regarding the analytic framework which should govern special access prices and whether the current price cap rules promote reasonable prices. Forborne high-capacity broadband services are not subject to the FCC's price cap or tariffing rules.

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<sup>21</sup> The Commission has long recognized the potential competitive impact of tariffs. *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004, ¶ 2 (1999).

<sup>22</sup> PAETEC Comments at 37-42.

Therefore, there is no basis in the context of this Public Notice to even address this issue.<sup>23</sup>

#### IV. CONCLUSION

The market for special access services is vibrant and is working as intended. There is no basis provided in the record for making any further changes to the analytical framework for special access services, or other high-capacity broadband services, especially those offered by mid-size carriers such as Hawaiian Telcom. Therefore, the FCC should terminate this inquiry.

Respectfully submitted,

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<sup>23</sup> For instance, Verizon's high-capacity broadband services are not subject to Title II regulation at all, and therefore, do not fall within the Commission's Title II jurisdiction. The instant notice, as well as the 2005 *Special Access NPRM*, are exclusively focused on Title II regulation of special access services. *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, WC Docket No. 05-25, 20 FCC Rcd 1994 (2005).

## Certificate of Service

I, Gregory J. Vogt, do hereby certify that I have on this 24th day of February 2010 caused a copy of the foregoing "Reply Comments Of Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Inc." to be served by electronic mail upon the following:

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/s/ Gregory J. Vogt

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